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5 JATINDER SINGH, et al.,
6 Plaintiffs,
7 v.
8 PAYWARD, INC. d/b/a KRAKEN,
9 Defendant.

10 Case No. [23-cv-01435-CRB](#)
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13 **ORDER GRANTING MOTION TO**
14 **COMPEL**

15 Jatinder Singh and Sandeep Singh (“Plaintiffs”) bring a putative class action suit
16 against Payward, Inc., d/b/a Kraken (“Defendant” or “Kraken”), arguing that, in violation
17 of the Illinois Biometric Information Privacy Act (“BIPA”), Defendant unlawfully
18 collected, obtained, used, stored, and disclosed Plaintiffs’ biometric identifiers, which
19 Plaintiffs submitted in the course of creating Kraken cryptocurrency trading accounts. See
20 Compl. (dkt. 1) at 1. Defendant now moves to compel arbitration, contending that
21 Plaintiffs’ claims are subject to Kraken’s Terms of Service (“TOS”), which includes a
22 valid, enforceable, and binding arbitration agreement between the parties. See Mot. (dkt.
23 12) at 1. In the alternative, Defendant moves to dismiss all four BIPA claims for either a
24 lack of standing or failure to state a claim. See id.

25 **I. BACKGROUND**

26 **A. Parties**

27 Defendant Payward, Inc. is a Delaware corporation that operates an “app-based”
28 platform, Kraken, that allows users to trade cryptocurrencies, cryptocurrency derivatives,
and other virtual commodities. See Compl. ¶ 1.

Plaintiffs Jatinder Singh and Sandeep Singh are residents of Illinois who each

1 opened a Kraken cryptocurrency trading account, in March and July of 2021 respectively.
2 See id. ¶ 18; Mot. at 2.

3 **B. Agreeing to Terms of Service**

4 To open a Kraken account, a user, among other things, must upload a copy of their
5 valid state-issued identification card and a picture of their face. Compl. ¶ 3. Kraken scans
6 the photograph and creates a biometric template of the user's face which is then compared
7 to the state-issued identification card to verify the user's identity. Id. ¶ 4. Before Kraken
8 obtains a user's biometric data, the user must first assent to Kraken's TOS and Privacy
9 Policy.

10 To sign up for a Kraken account, the user enters a name and password on the
11 website, provides their email, enters their state and country of residence, and checks a box
12 that states "By continuing I agree to the Terms of Service and Privacy Policy." Davie
13 Decl. (dkt. 12-8) Ex. F (emphasis in original). Within that sentence, the words "Terms of
14 Service" and "Privacy Policy" are distinguished from the surrounding grey font by a
15 purple font to indicate that it is a hyperlink. Id. To view the TOS, the user must click on
16 the "Terms of Service" hyperlink. Davie Decl (dkt 12-2) ¶ 17. While the user must check
17 the box that acknowledges agreement to the TOS to proceed with their account creation,
18 the user is not required to view the TOS. Id. ¶¶ 6, 17–18.

19 Once the box is checked, the "Create Account" button changes from grey to purple,
20 which allows the user to proceed with the creation of their account. Id. ¶¶ 17–19.

21 **C. Arbitration Clause**

22 Kraken's TOS contains the following clauses pertinent to arbitration. First, at the
23 top of the TOS, it reads:

24 PLEASE READ THESE TERMS OF SERVICE
25 CAREFULLY. BY CLICKING THE "CREATE ACCOUNT"
26 BUTTON OR BY ACCESSING OR USING THE SERVICES,
27 YOU AGREE TO BE LEGALLY BOUND BY THESE
TERMS OF SERVICE AND ALL TERMS INCORPORATED
BY REFERENCE.

1 Davie Decl. (dkt. 12-4; dkt. 12-7) Ex. B & E at 2.¹ Second, the “Summary of Terms of
2 Service” highlights important provisions of the agreement, including: “There are important
3 legal terms provided below in the complete Terms of Service, including your
4 indemnification responsibilities, our limitation of liability and warranty disclaimers, and
5 your agreement to arbitrate most disputes.” Id. at 3 (emphasis in original). Finally, the
6 arbitration clause states:

7 PLEASE READ THE FOLLOWING PARAGRAPH
8 CAREFULLY BECAUSE IT REQUIRES YOU TO
9 ARBITRATE DISPUTES WITH US AND IT LIMITS THE
MANNER IN WHICH YOU CAN SEEK RELIEF.

10 You and Payward agree to arbitrate any dispute arising from
11 these Terms or your use of the Services, except for disputes in
12 which either party seeks equitable and other relief for the alleged
13 unlawful use of copyrights, trademarks, trade names, logos,
14 trade secrets, or patents. ARBITRATION PREVENTS YOU
15 FROM SUING IN COURT OR FROM HAVING A JURY
16 TRIAL. You and Payward agree to notify each other in writing
17 of any dispute within thirty (30) days of when it arises. . . . You
18 and Payward further agree: (a) to attempt informal resolution
19 prior to any demand for arbitration; (b) that any arbitration will
20 occur in San Francisco, California; (c) that arbitration will be
21 conducted confidentially by a single arbitrator in accordance
22 with the rules of JAMS; and (d) that the state or federal courts
23 in San Francisco, California have exclusive jurisdiction over any
24 appeals of an arbitration award and over any suit between the
parties not subject to arbitration. Other than class procedures
and remedies discussed below, the arbitrator has the authority to
grant any remedy that would otherwise be available in court.
Any dispute between the parties will be governed by these
Terms and the laws of the State of California and applicable
United States law, without giving effect to any conflict of laws
principles that may provide for the application of the law of
another jurisdiction.

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26 ¹ Ex. B references a screen shot of the TOS on Kraken’s website as of July 10, 2021, the
date Jatinder Singh created his Kraken account. See Davie Decl. ¶¶ 9, 11. Ex. E
27 references a screen shot of the TOS on Kraken’s website as of March 12, 2021, the date
Sandeep Singh created his Kraken account. See id. ¶¶ 13, 15. Both screenshots contain
28 the same language with respect to the referenced clauses.

1 Id. at 22. The same paragraph also states that: “Whether the dispute is heard in arbitration
2 or in court, you and Payward will not commence against the other a class action, class
3 arbitration or representative action or proceeding.” Id.

4 **D. Procedural History**

5 On March 27, 2023, Plaintiffs brought this suit² against Defendant. See Compl.
6 Plaintiffs allege that Kraken “collects, stores, possesses, otherwise obtains, uses, and
7 disseminates its users’ biometric data [that Defendant obtains when the account is created]
8 to, amongst other things, further enhance Kraken and its online ‘app-based’ platform.
9 [Furthermore], Kraken wrongfully profits from the facial scans.” Id. ¶¶ 5–6. Plaintiffs
10 argue that these actions violate four provisions of BIPA that aim “to protect citizen’s
11 privacy interests in their biometric data.” Id. ¶¶ 8, 53–80.

12 On May 30, 2023, Defendant moved to compel arbitration, arguing that the
13 arbitration agreement contained in the TOS governs the claims. See Mot. at 7–10. In the
14 alternative, Defendant moves to dismiss the claims on the grounds that Plaintiffs do not
15 have standing to bring their claims, and fail to state a claim. Id. at 12–15. The motion is
16 fully briefed, and the Court held a hearing on August 18, 2023. See Opp’n (dkt. 19);
17 Reply (dkt. 20); Motion Hearing (dkt. 21).

18 **II. LEGAL STANDARD**

19 Contracts “evidencing a transaction involving commerce” are subject to the Federal
20 Arbitration Act (“FAA”). See Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126,
21 1130 (9th Cir. 2000) (citing 9 U.S.C. § 2). The FAA establishes a strong federal policy
22 favoring arbitration, providing that agreements to submit commercial disputes to
23 arbitration shall be “valid, irrevocable, and enforceable, save upon such grounds as exist at
24 law or in equity for the revocation of any contract.” 9 U.S.C. § 2; see also Blair v. Rent-A-
25 Ctr., Inc., 928 F.3d 819, 825 (9th Cir. 2019) (citing id.). “[A]ny party bound to an

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28 ² On January 21, 2023, Plaintiffs brought a similar suit in the Northern District of Illinois.
Mot. at 4 (citing Martin Decl. ¶¶ 2–4). Defendant demanded arbitration and Plaintiffs
voluntarily dismissed the suit on March 19, 2023. Id.

1 arbitration agreement that falls within the scope of the FAA may bring a motion in federal
2 district court to compel arbitration.” Magana v. DoorDash, Inc., 343 F. Supp. 3d 891, 898
3 (N.D. Cal. 2018) (citing 9 U.S.C. §§ 3–4).

4 When deciding whether to compel arbitration under the FAA, a court’s role is
5 “limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2)
6 whether the agreement encompasses the dispute at issue.” Chiron Corp., 207 F.3d at 1130.
7 If the answer to both questions is “yes,” the court must enforce the arbitration agreement.
8 See id. “When deciding whether the parties agreed to arbitrate a certain matter (including
9 arbitrability), courts generally . . . apply ordinary state-law principles that govern the
10 formation of contracts.” First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944
11 (1995).

12 III. DISCUSSION

13 Defendant argues primarily that the parties agreed to delegate the issue of
14 arbitrability to the arbitrator. See Mot. at 6. Plaintiffs counter that the Court, not an
15 arbitrator, must decide the issue of arbitrability, that Plaintiffs did not unambiguously
16 manifest assent to Defendant’s TOS, and that even if they did, the arbitration agreement is
17 unconscionable and therefore, unenforceable. See Opp’n 7–11. This order will discuss
18 (A) the issue of contract formation; (B) Plaintiffs’ assertion of unconscionability; and (C)
19 the issue of arbitrability. Because the Court concludes that the parties have entered into a
20 valid agreement that delegates the issue of arbitrability, it does not go on to reach
21 Defendant’s alternative motion to dismiss.

22 A. Contract Formation

23 Plaintiffs argue that they did not assent to the TOS and therefore that no contract
24 was ever formed. Opp’n at 3–8. The Court will decide this issue rather than letting the
25 arbitrator decide it. See Belyea v. GreenSky, Inc., No. 20-cv-1693-JCS, 2020 WL
26 3618959, at *3 (N.D. Cal. July 2, 2020) (“The question of contract formation, however, is
27 not a delegable gateway issue.”) (quoting Kum Tat Ltd. v. Linden Ox Pasture, LLC, 845
28 F.3d 979, 983 (9th Cir. 2017) (“[a]lthough challenges to the validity of a contract with an

1 arbitration clause are to be decided by the arbitrator, challenges to the very existence of the
2 contract are, in general, properly directed to the court.”)); Galilea, LLC v. AGCS Mar. Ins.
3 Co., 879 F.3d 1052, 1056 (9th Cir. 2018) (court “must first make a threshold finding that
4 the document [evidencing an agreement] at east purports to be . . . a contract”)(internal
5 quotation marks omitted).

6 As the party seeking to compel arbitration, Defendant “bears the burden of proving
7 the existence of an agreement to arbitrate by a preponderance of the evidence.” Lopez v.
8 Dave Inc., No. 22-cv-4160-VC, 2022 WL 17089824, at *1 (N.D. Cal., Nov. 21, 2022)
9 (internal quotation marks omitted). “Arbitration is a matter of contract.” Knutson v. Sirius
10 XM Radio Inc., 771 F.3d 559, 565 (9th Cir. 2014) (internal quotation marks omitted).
11 “[A] party cannot be required to submit to arbitration any dispute which he has not agreed
12 so to submit.” Id. at 565 (internal quotation marks omitted). “In determining whether the
13 parties have agreed to arbitrate a particular dispute, federal courts apply state-law
14 principles of contract formation.” Berman v. Freedom Fin. Network, LLC, 30 F.4th 849,
15 856 (9th Cir. 2022). The parties here agree that California law governs. Mot. at 7; Opp’n
16 at 3.

17 Plaintiffs argue that the website did not provide reasonably conspicuous notice of
18 the TOS and that Plaintiffs did not manifestly assent to the TOS. Opp’n at 5–8.³ These are
19 indeed the two issues the Court must address. See Sellers v. JustAnswer LLC, 73 Cal.
20 App.5th 444, 466–71 (2021); see also Berman, 30 F.4th at 856 (“. . . an enforceable
21 contract will be found based on an inquiry notice theory only if: (1) the website provides
22 reasonably conspicuous notice of the terms to which the consumer will be bound; and (2)
23 the consumer takes some action, such as clicking a button or checking a box, that
24 unambiguously manifests his or her assent to those terms.”) (citing Meyer v. Uber Techs.,

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28 ³ Plaintiffs contend that this is a “sign-in wrap agreement,” id. at 4, while Defendant
contends that it is a “clickwrap agreement,” Reply at 3. The Court is inclined to agree with
Defendant on this point (as Kraken users must click that they agree), but the precise label
does not matter; so long as the agreement gave reasonably conspicuous notice and
Plaintiffs manifestly assented, there was an agreement.

1 Inc., 868 F.3d 66, 74 (2d Cir. 2017); Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1173
2 (9th Cir. 2014)).

3 There was conspicuous notice here. To open a Kraken account, Plaintiffs had to
4 check a box that states, “By continuing I agree to the Terms of Service and Privacy
5 Policy.” Davie Decl. Ex. F (emphasis in original). Within that sentence, the words
6 “Terms of Service” and “Privacy Policy” are the same size as the rest of the writing but are
7 distinguished from the surrounding grey font, and from the white background, by a purple
8 font to denote a hyperlink. Id. There is little other text on the page to draw the consumer’s
9 attention away from the hyperlinks, and the hyperlinks are the only colored text on the
10 page. Id.; see also Peter v. DoorDash, Inc., 445 F. Supp. 3d 580, 586 (N.D. Cal. 2020)
11 (plaintiffs on notice where “text contrasts clearly with the background and is plainly
12 readable”). To view the TOS, the user can click on the “Terms of Service” hyperlink.
13 Davie Decl. ¶ 17. This notice is conspicuous and varies from the notice in Berman, where
14 the link to the terms and conditions to which the user allegedly agreed was “printed in a
15 tiny gray font considerably smaller than the font used in the surrounding website elements
16 . . . barely legible to the naked eye.” 30 F.4th at 856–57.

17 There was also an unambiguous manifestation of agreement here. Defendant’s
18 webpage required the consumer to click on “By continuing I agree to the Terms of Service
19 and Privacy Policy” before moving on to open an account. Davie Decl. Ex. F. Once the
20 “By continuing I agree to the Terms of Service and Privacy Policy” box is checked, the
21 “Create Account” button changes from grey to purple, which allows the user to proceed
22 with the creation of their account. Davie Decl. Ex. F ¶¶ 17–19. A user cannot proceed to
23 creating an account without first clicking on the box that says that they agreed to the TOS.
24 Id. This is far superior to the website in Berman, which did not state that clicking the
25 “Continue” button manifested assent to the terms and conditions. See 30 F.4th at 858
26 (“This notice defect could easily have been remedied by including language such as, ‘By
27 clicking the Continue >> button, you agree to the Terms & Conditions.’”); see also Sellers,
28 73 Cal. App.5th at 453 (consumer clicked “Start my trial” and only “in very small print

1 further down the page” did the webpage state: ““By clicking ‘Start my trial’ you indicate
2 that you agree to the terms of service and are 13+ years old.””).

3 Accordingly, Plaintiffs here agreed to the TOS. See Alfia v. Coinbase Global, Inc.,
4 No. 21-cv-8689-HSG, 2022 WL 3205036, *2 (N.D. Cal. July 22, 2022) (holding, where
5 “Plaintiff had to click a ‘check box’ next to the language ‘I certify that I am 18 years of
6 age or older, and I agree to the User Agreement and Privacy Policy,’ with both agreements
7 accessible via hyperlink,” that plaintiff had “clear notice . . . and took physical action to
8 manifest his assent”).

9 **B. Unconscionability**

10 Plaintiffs also argue that the arbitration clause is unconscionable. Opp’n at 8–11.

11 Under California law, a contract is unenforceable when it is both procedurally and
12 substantively unconscionable:

13 [T]he prevailing view is that procedural unconscionability and
14 substantive unconscionability need not both be present to the
15 same degree: Essentially a sliding scale is invoked which
16 disregards the regularity of the procedural process of the
contract formation . . . in proportion to the greater harshness or
unreasonableness of the substantive terms themselves.

17 Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1280 (9th Cir. 2006) (internal quotation
18 marks omitted) (quoting Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal.4th
19 83, 114 (2000)).

20 **1. Procedural Unconscionability**

21 A determination of procedural unconscionability involves the analysis of two
22 factors: (1) oppression; and (2) surprise. Id. at 1280. Oppression is found when there is
23 such an inequality in bargaining power between two parties that there is no actual
24 negotiation and a lack of meaningful choice. Id. Surprise is found when the “supposedly
25 agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to
26 enforce them.” Id. (internal quotation marks omitted).

27 Plaintiffs’ only argument for procedural unconscionability is that the TOS is a
28 contract of adhesion, giving Plaintiffs “no ability to negotiate the terms.” Opp’n at 8.

1 California courts consider contracts of adhesion procedurally unconscionable to at least a
2 minimal degree due to a lack of bargaining power. Bridge Fund Cap. Corp. v. Fastbucks
3 Franchise Corp., 622 F.3d 996, 1004 (9th Cir. 2010). However, California courts only
4 refuse to enforce contracts of adhesion if they are “unduly oppressive.” Armendariz, 24
5 Cal.4th at 113. The TOS has some degree of procedural unconscionability. But see
6 Darnaa, LLC v. Google, Inc., No. 15-cv-3221-RMW, 2015 WL 7753406, *2 (N.D. Cal.
7 Dec. 2, 2015) (“court finds the level of procedural unconscionability to be slight, as
8 plaintiff does not lack meaningful choice.”); Reply at 7 (Defendant is one of numerous
9 companies offering cryptocurrency exchange services).

10 **2. Substantive Unconscionability**

11 Substantive unconscionability occurs when the terms of the agreement are one-
12 sided. Little v. Auto Stiegler, Inc., 29 Cal.4th 1064, 1071 (2003). A court will refuse to
13 enforce an agreement, rather than sever the offending unconscionable provision, where the
14 agreement is “permeated” with unconscionability. Armendariz, 24 Cal.4th at 122.

15 Plaintiffs argue that the arbitration agreement is substantively unconscionable. See
16 Opp’n at 9–11. But the provisions they highlight are almost entirely in the TOS as a whole
17 and not in the actual arbitration provision, let alone the asserted delegation language in the
18 arbitration provision. See id. “Where a plaintiff’s unconscionability challenge is directed
19 not to the delegation provision specifically, but, rather, to the arbitration agreement as a
20 whole, the Court must enforce the delegation provision and leave such challenges for the
21 arbitrator.” Aggarwal et al. v. Coinbase, Inc., No. 22-cv-4829-JSW, 2023 WL 4935003, at
22 *9 (N.D. Cal. Aug. 2, 2023) (cleaned up) (quoting Pearl v. Coinbase Glob., Inc., No. 22-
23 cv-3561-MMC, 2023 WL 1769190, at *7 (N.D. Cal. Feb. 3, 2023) (quoting Rent-A-Ctr.,
24 West, Inc. v. Jackson, 561 U.S. 63, 72 (2010) and Brennan v. Opus Bank, 796 F.3d 1125,
25 1133 (9th Cir. 2015) (where no argument “specific to the delegation provision” is made,
26 unconscionability challenge is “for the arbitrator”)).

27 The only substantive unconscionability challenge that Plaintiffs make that actually
28 pertains to the arbitration clause is the 30-day notice provision, which Plaintiffs argue

shortens the statute of limitations for Defendant's consumers to bring this type of claim against it from five years to 30 days. See Opp'n at 9–10. This would be problematic. See Martinez v. Master Protection Corp., 118 Cal. App. 4th 107, 117 (2004) (arbitration agreement requiring assertion of claims within six months rather than "significantly longer" statute of limitation was substantively unconscionable). However, Defendant is not availing itself of the notice provision here, or claiming that Plaintiffs' case is untimely. See Reply at 9 (insisting that that provision "does not provide for forfeiture of a claim" and is instead a means of "informal resolution"). Defendant reiterated that point at the motion hearing. Combined with the moderate degree of procedural unconscionability, the 30-day notice provision is not enough to render the entire arbitration agreement unconscionable.

C. Arbitrability

The final issue, and the biggest one, is whether this Court or the arbitrator should decide whether the case is arbitrable.

1. Governing Law

In order to determine who decides the question of arbitrability, the Court must first address the applicable law that governs the dispute. "[F]ederal law governs the arbitrability question by default because the Agreement is covered by the FAA" except where the parties have "clearly and unmistakably designated that nonfederal arbitrability law applies." Brennan, 796 F.3d at 1129 (emphasis in original) (citing Cape Flattery Ltd. v. Titan Maritime, 647 F.3d 914, 921 (9th Cir. 2011)).

The arbitration agreement within the TOS here states that "[a]ny dispute between the parties will be governed by these Terms and the laws of the State of California and applicable United States law, without giving effect to any conflict of laws principles that may provide for the application of the law of another jurisdiction." Davie Decl. Ex. B at 22. The agreement therefore does not explicitly state whether California or federal law governs the question of arbitrability. Because there is ambiguity as to whether the question of arbitrability is governed by California law, there is not "clear and unmistakable evidence that the parties agreed to apply non-federal arbitrability law." See Shierkatz

1 RLLP v. Square, Inc., No. 15-cv-02202-JST, 2015 WL 9258082, at *5 (N.D. Cal. Dec. 17,
2 2015) (citing Brennan, 796 F.3d at 1129); see also Cape Flattery Ltd., 647 F.3d at 921
3 (holding that “courts should apply federal arbitrability law absent ‘clear and unmistakable
4 evidence’ that the parties agreed to apply non-federal arbitrability law.”) (citing Kaplan,
5 514 U.S. at 944). Thus, the Court applies federal arbitrability law.

6 **2. Who Decides Arbitrability**

7 **a. Delegation**

8 The “gateway” question of arbitrability asks “whether the parties have submitted a
9 particular dispute to arbitration.” Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83
10 (2002). The parties can agree that this question, like any other, will be decided by an
11 arbitrator. See Rent-A-Ctr., 561 U.S. at 68–69; see also Henry Schein, Inc. v. Archer &

12 White Sales, Inc., 139 S. Ct. 524 (2019) (“[I]f a valid agreement exists, and if the
13 agreement delegates the arbitrability issue to an arbitrator, a court may not decide the
14 arbitrability issue.”). However, “the federal policy in favor of arbitration does not extend
15 to deciding questions of arbitrability.” Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d
16 1069, 1072 (9th Cir. 2013). Courts should presume that they determine arbitrability
17 “‘[u]nless the parties clearly and unmistakably provide otherwise.’” Howsam, 537 U.S. at
18 83 (quoting AT&T Techs., Inc. v. Commc’ns Workers, 475 U.S. 643, 649 (1986)). Clear
19 and unmistakable evidence can be “a course of conduct demonstrating assent . . . or . . . an
20 express agreement.” Momot v. Mastro, 652 F.3d 982, 988 (9th Cir. 2011) (omissions in
21 text). Silence or ambiguity must be construed in favor of the court deciding the issue of
22 arbitrability. Kaplan, 514 U.S. at 945–47.

23 Defendant argues that the parties agreed to delegate the issue of arbitrability to an
24 arbitrator, noting that the TOS incorporates the JAMS rules into its arbitration agreement,
25 Mot. at 6; Davie Decl. ¶¶ 11, 15, Exs. B &E § 23 (“arbitration will be conducted
26 confidentially by a single arbitrator in accordance with the rules of JAMS”), and those
27 rules provide that “[j]urisdictional and arbitrability disputes, including disputes over the
28 formation, existence, validity, interpretation or scope of the agreement under which

1 Arbitration is sought . . . shall be submitted to and ruled on by the Arbitrator. The
2 Arbitrator has the authority to determine jurisdiction and arbitrability issues as a
3 preliminary matter,” Mot. at 6–7; Martin Decl. (dkt. 12-12) Ex. I, Rule 11(b). Defendant
4 contends that by incorporating the JAMS rules into the agreement, “the parties have
5 ‘clearly and unmistakably’ delegated the issue of arbitrability to the arbitrator.” Mot. at 7.

6 Plaintiffs respond that the “mere incorporation” of the JAMS rules does not show
7 “clear and unmistakable evidence” of delegating the question of arbitrability to the
8 arbitrator. Opp’n at 2. Plaintiffs insist that where a contract “includes a severability clause
9 stating a court of competent jurisdiction may excise an unconscionable provision,” the
10 parties have not clearly and unmistakably delegated the question of arbitrability to the
11 arbitrator. Id. (citing Najarro v. Superior Court, 70 Cal.App.5th 871, 880 (2021)).

12 The Ninth Circuit held in Brennan “that incorporation of the [American Arbitration
13 Association, or AAA] rules constitutes clear and unmistakable evidence that contracting
14 parties agreed to arbitrate arbitrability.” 796 F.3d at 1130; see also Oracle Am., Inc., 724
15 F.3d at 1074 (“Virtually every circuit to have considered the issue has determined that
16 incorporation of the American Arbitration Association’s (AAA) arbitration rules
17 constitutes clear and unmistakable evidence that the parties agreed to arbitrate
18 arbitrability.”). Incorporation of the JAMS rules is no different. See Caviani v. Mentor
19 Graphics Corp., No. 19-cv-01645-EMC, 2019 WL 4470820, at *4–5 (N.D. Cal. Sept. 18,
20 2019). One notable limitation of Brennan, though, is that the Ninth Circuit restricted its
21 holding to contracts between sophisticated parties. 796 F.3d at 1130. Even so, the court
22 made clear that it did “not foreclose the possibility that this rule could also apply to
23 unsophisticated parties or to consumer contracts.” Id. In fact, the court pointed out that
24 “the vast majority of the circuits that hold that incorporation of the AAA rules constitutes
25 clear and unmistakable evidence of the parties’ intent do so without explicitly limiting that
26 holding to sophisticated parties or to commercial contracts.” Id. at 1130–31.

27 Since Brennan, in the absence of a Ninth Circuit case involving clearly
28 unsophisticated parties, district courts within the Ninth Circuit have been split as to

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1 whether the incorporation of the AAA or JAMS rules into a contract is clear and
 2 unmistakable assent by all parties, sophisticated or not, to arbitrate arbitrability. See Eiess
 3 v. USAA Fed. Sav. Bank, 404 F. Supp. 3d 1240, 1252–53 (N.D. Cal. 2019) (explaining
 4 split).

5 A number of courts in this district have concluded that incorporation of the AAA or
 6 JAMS rules is sufficient for a court to find intent to delegate arbitrability, regardless of the
 7 parties' sophistication. See, e.g., Bazine v. Kelly Servs. Global, LLC, No. 22-cv-7170-
 8 BLF, 2023 WL 4138252, at *6 (N.D. Cal. June 21, 2023) (siding with courts holding that
 9 incorporation of rules is adequate regardless of sophistication of parties); Luckert v. Tesla
 10 Energy Ops., Inc., No. 21-cv-3027-VC, 2021 WL 3721967 (N.D. Cal. Aug. 5, 2021)
 11 (holding in one-paragraph order that incorporating JAMS rules delegates arbitrability);
 12 Gerlach v. Tickmark, Inc., No. 21-cv-2768-YGR, 2021 WL 3191692, at *4 (N.D. Cal. July
 13 28, 2021) ("the greater weight of authority" holds that incorporating rules is enough to
 14 delegate).⁴

15 The Court agrees that Brennan supports so holding, and concludes herein that the
 16 alternative requires impractical line-drawing.⁵ Moreover, the Court observes that Plaintiffs
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18 ⁴ Interestingly, in Gutierrez v. FriendFinder Networks Inc., No. 18-cv-5918-BLF, 2019
 19 WL 1974900, at *9 (N.D. Cal. May 3, 2019), Judge Freeman held that the parties had
 20 delegated arbitrability where—without discussing the sophistication of the parties—the
 21 contract incorporated JAMS and AAA rules and said that "any claim, dispute, or
 22 controversy . . . between you and us. . . relating to these Terms, its interpretation, or the
 23 breach, termination, or validity hereof . . . shall be resolved exclusively and finally by
 24 binding arbitration." Judge Freeman cited to the Ninth Circuit in Momot, 652 F.3d at 988,
 25 which held that language stating that "the validity or application of any of the provisions of
 26 the arbitration clause" were subject to arbitration was a clear and unmistakable delegation
 27 of arbitrability. Gutierrez, 2019 WL 1974900, at *9. Here, the arbitration clause does not
 28 use the word "validity," but does state that "You . . . agree to arbitrate any dispute arising
 from these Terms" and that "arbitration will be conducted by . . . JAMS," Davie Decl. Ex. B ¶ 23.

29 ⁵ No doubt, reasonable jurists have reached the opposite conclusion. See, e.g., Hooper v.
Jerry Ins. Agency, LLC, No. 22-cv-4232-JST, 2023 WL 3992130, at *7 (N.D. Cal. June 1,
 30 2023) ("This Court has twice before declined to extend Brennan to a case involving an
 31 unsophisticated party"); Eiess v. USAA Federal Savings Bank, 404 F. Supp. 3d 1240,
 32 1252–53 (N.D. Cal. 2019) (for incorporation of rules to mean delegation, parties should be
 33 sophisticated). Indeed, this Court recently declined to disregard sophistication in Flora v.
Prisma Labs, Inc., No. 23-cv-680-CRB, 2023 WL 5061955, at *4–5, n.7 (N.D. Cal. Aug.
 34 8, 2023), where one of the plaintiffs was a minor.

here—cryptocurrency traders, see Compl. ¶¶ 1–2—do not assert that they are unsophisticated. They do not object to the Court interpreting the TOS’s incorporation of the JAMS rules as a delegation of arbitrability based on any claimed lack of sophistication. Rather, they hang their hats on a novel argument about the severability clause, discussed next. See Opp’n at 2.

b. Severability Clause

Plaintiffs contend that the incorporation of the JAMS rules does not clearly evidence an agreement to delegate arbitrability because:

First, the severability clause states “[t]he invalidity or unenforceability of any of these Terms shall not affect the validity or enforceability of any other of these Terms, all of which shall remain in full force and effect.” TOS, ¶ 24.4. Second, the arbitration agreement states “that the state or federal courts in San Francisco, California have exclusive jurisdiction over any appeals of an arbitration award and over any suit between the parties not subject to arbitration.” TOS, ¶ 23, italics added. The combination of the severability clause and [the] term in the arbitration agreement conclusively allows this Court to determine the gateway question. Even if the severability clause and the term in the arbitration agreement do not conclusively give this Court the power to determine enforceability, those terms, at the very least, create ambiguity as to who decides the threshold issue.

Opp’n at 2. This argument fails as an initial matter because, as Defendant reasons, the “arbitrability provision does not include a severability clause.” Reply at 2.

Moreover, the cases that Plaintiffs rely on for their severability clause argument are distinguishable. See id. (citing to Najarro, 70 Cal.App.5th at 880; Hartley v. Sup. Ct., 196 Cal.App.4th 1249, 1257–58 (2011); Parada v. Superior Court, 176 Cal.App.4th 1554, 1566 (2009); Baker v. Osborne Dev. Corp., 159 Cal.App.4th 884, 893–94 (2008)). In Najarro, the parties’ agreement included a severability clause that said “. . . if the arbitrator or any judge of competent jurisdiction determines that any provision of the JAMS Rules or this [a]greement is illegal, invalid, or unenforceable, such provisions shall be severed” 70 Cal.App.5th at 877–78. Because the severability clause mentioned a court as well as an arbitrator severing the agreement, there was no clear and unmistakable delegation to the

1 arbitrator. Id. at 880. In Hartley, the agreement provided that there was no waiver (no bar
2 to seeking relief from a court) for equitable relief, and the severability clause stated that
3 “In the event that any provision of this Agreement shall be determined by a trier of fact of
4 competent jurisdiction to be unenforceable in any jurisdiction, the remainder of this
5 Agreement shall remain binding. . . .” 196 Cal.App.4th at 1257 (emphasis in original).
6 The court explained that those provisions left open the possibility that “the court has
7 authority to decide whether an arbitration provision is unenforceable.” Id. at 1258. In
8 Parada, the contract included a severability clause that said “[i]n the event that any
9 provision of this Agreement shall be determined by a trier of fact of competent jurisdiction
10 to be unenforceable in any jurisdiction . . .” while the arbitration provisions referred to
11 arbitration “heard by and determined by a panel of three (3) arbitrators.” 176 Cal.App.4th
12 at 1566 (emphasis in original). The court concluded that “Use of the term ‘trier of fact of
13 competent jurisdiction’ instead of ‘arbitration panel’ or ‘panel of three (3) arbitrators’
14 suggests the trial court also may find a provision, including the arbitration unenforceable.”
15 Id. at 1566. And in Baker, because the severability clause referred to the possibility that
16 “any provision of this arbitration agreement shall be determined by the arbitrator or by any
17 court to be unenforceable,” it “acknowledge[d] the possibility that enforceability issues
18 will be decided, not by the arbitrator, but rather by the court.” 159 Cal.App.4th at 891
19 (emphasis in original).

20 Here, the severability clause does not mention a judge, as in Najarro, or a court, as
21 in Baker, or a “trier of fact of competent jurisdiction,” as in Hartley or Parada. It simply
22 says: “The invalidity or unenforceability of any of these Terms shall not affect the validity
23 or enforceability of any other of these Terms, all of which shall remain in full force and
24 affect.” Davie Decl. Ex. B ¶ 24.4. That provision leaves no opening for the notion that a
25 judge will be the one determining severability.

26 In order to try to analogize the TOS here with the agreements found to lack clear
27 delegation to an arbitrator in Najarro, Hartley, Parada and Baker, Plaintiffs assert that the
28 arbitration provision here mentions courts: it says “the state or federal courts in San

1 Francisco, California have exclusive jurisdiction over any appeals of an arbitration award
2 and over any suit between the parties not subject to arbitration.” See Opp’n at 2 (citing
3 Davie Decl. Ex. B ¶ 23). Plaintiffs assert that “[t]he combination of the severability clause
4 and [the] term in the arbitration agreement [about courts] conclusively allows this Court to
5 determine the gateway question.” Id. But paragraph 23, the arbitration provision from
6 which that language about courts comes, begins by saying: “PLEASE READ THE
7 FOLLOWING PARAGRAPH CAREFULLY BECAUSE IT REQUIRES YOU TO
8 ARBITRATE DISPUTES WITH US AND IT LIMITS THE MANNER IN WHICH YOU
9 CAN SEEK RELIEF.” Davie Decl. Ex. B ¶ 23 (emphasis added). It then states: “You and
10 Payward agree to arbitrate any disputes arising from these Terms or your use of the
11 Services, except for disputes in which either party seeks equitable and other relief for the
12 alleged unlawful use of copyrights, trademarks, trade names, logos, trade secrets or
13 patents. ARBITRATION PREVENTS YOU FROM SUING IN COURT OR FROM
14 HAVING A JURY TRIAL.” Id. (emphasis added). That language is not ambiguous. It
15 quite clearly explains that unless a plaintiff is seeking “equitable and other relief for the
16 alleged unlawful use of copyrights, trademarks, trade names, logos, trade secrets or
17 patents,” that plaintiff will have to arbitrate his or her claim. The later line in this
18 provision stating that “state or federal courts in San Francisco, California have exclusive
19 jurisdiction over any appeals of an arbitration award or over any suit between the parties
20 not subject to arbitration” does not change anything; it simply limits the courts’
21 involvement to appeals of arbitration awards and cases where a plaintiff is seeking
22 “equitable and other relief for the alleged unlawful use of copyrights, trademarks, trade
23 names, logos, trade secrets or patents.” No one reading the arbitration agreement and the
24 severability clause together would reasonably think that—if they brought any kind of suit
25 other than one seeking “equitable and other relief for the alleged unlawful use of
26 copyrights, trademarks, trade names, logos, trade secrets or patents”—a court could sever
27 terms in the arbitration agreement or decide the issue of arbitrability.

28 Plaintiffs’ argument based on the severability clause is therefore unconvincing.

1 Accordingly, the Court concludes that the parties entered into a valid agreement,
2 and that that agreement delegates the question of arbitrability to an arbitrator.

3 **IV. CONCLUSION**

4 For the foregoing reasons, the Court GRANTS the motion to compel and STAYS
5 the action pending arbitration. The Court further DISMISSES the class claims.⁶

6 **IT IS SO ORDERED.**

7 Dated: August 22, 2023



CHARLES R. BREYER
United States District Judge

United States District Court
Northern District of California

26 ⁶ Defendant moved to dismiss the class claims, arguing that the arbitration clause includes
27 a class action waiver. See Mot. at 3–4. Plaintiffs do not oppose this. See Opp'n; Reply at
28 14–15. And indeed, the arbitration provision bars class actions. See Davie Decl. Ex. B ¶ 23 (“Whether the dispute is heard in arbitration or in court, you and Payward will not commence against the other a class action, class arbitration or representative action or proceeding.”).